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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM L. LUKHARD, Commissioner of the Virginia Department of Social Services,

Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, and all others similarly situated,

Respondents.

BRIEF OF AMICI CURIAE THE STATES OF ILLINOIS, INDIANA, WEST VIRGINIA, GEORGIA, NORTH CAROLINA, SOUTH CAROLINA, AND THE COMMONWEALTH OF PENNSYLVANIA ON BEHALF OF THE PETITIONER

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QUESTION PRESENTED

Whether the receipt of a personal injury award qualifies as income under the Aid to Families with Dependent Children program's "lump sum rule," codified at 42 U.S.C. §602(a)(17), which Congress enacted to correct a disincentive against family budgeting and to retarget scarce public assistance resources.

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BRIEF OF AMICI CURIAE THE STATES OF ILLINOIS, INDIANA, WEST VIRGINIA, GEORGIA, NORTH CAROLINA, SOUTH CAROLINA, AND THE COMMONWEALTH OF PENNSYLVANIA ON BEHALF OF THE PETITIONER

The States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania as *amici curiae* respectfully join in the Petition of William L. Lukhard, Commissioner of the Virginia Department of Social Services, in requesting that a writ of certiorari issue to review the judgment entered October 10, 1985, of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF INTEREST

The States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania have a direct financial and public policy interest in the outcome of this case. Each *amici* has a "single state agency" designated to administer the State plans for Title IV of the Social Security Act, known as the Aid to Families with Dependent Children program. 42 U.S.C. §602(a)(3). Included within the operation of this program is the so-called "lump sum rule," whereby nonrecurring lump sum payments are treated as income for purposes of determining eligibility for assistance. 42 U.S.C. §602(a)(17).

Personal injury awards are treated as income under the lump sum rule in these states. This treatment is currently the subject of litigation. *See Davis v. Coler*, 601 F. Supp. 444 (N.D. Ill. 1984), *appeal pending*, No. 85-2481 (7th Cir. argued Feb. 21, 1986); *Watkins v. Blinzinger*, 610 F. Supp. 1443 (S.D. Ind. 1985), *appeal pending*, No. 85-2366 (7th Cir. argued Feb. 21, 1986); *Miller v. Lord*, No. 85-0500 (N.D. W. Va. preliminary injunction issued on behalf of named plaintiffs May 16, 1985); *Rochester v. Ledbetter*, No. CV 585-132 (S.D. Ga. preliminary injunction denied Jan. 8, 1986); *Finch v. Kirk*, No. 86-90-CIV-5 (E.D. N.C. removed Jan. 21, 1986).

In *Davis* and *Watkins*, the district courts held that the States' treatment of personal injury awards as lump sum income was proper. The Fourth Circuit ruling is in direct opposition to the district courts' decisions in Illinois and Indiana. It is clear that the States have a vital interest in distributing limited fiscal resources to those persons most needy. A holding in the Seventh Circuit similar to that of the Fourth Circuit would sabotage that interest. It is also clear that the States have a strong public policy interest in a uniform interpretation of the law.

REASONS FOR GRANTING THE WRIT

In passing the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), Pub. L. No. 97-35, 95 Stat. 357, Congress enacted various amendments and cutbacks in federally funded programs. OBRA was intended to alter federal fiscal policies and to restrain federal spending "in order to wage an effective battle against the high inflation and unemployment which have plagued the national economy for many years." S. Rep. No. 139, 97th Cong., 1st Sess. 3, *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 398. One of the OBRA amendments, the so-called "lump sum rule," contained in section 2304 of OBRA, codified at 42 U.S.C. §602(a)(17), is the subject matter of this lawsuit and numerous other actions across the nation. The lump sum rule requires states to budget nonrecurring lump sum payments as income for purposes of determining eligibility under the Aid to Families with Dependent Children program ("AFDC"). 45 C.F.R. §233.20(a)(3)(ii)(D).

In regulating the application of the lump sum rule, the United States Department of Health and Human Services has consistently permitted the administering state agencies to include a personal injury award as lump sum income. The Fourth Circuit, however, held that "the lump sum rule may not be applied to personal injury awards to render AFDC recipients ineligible for benefits." *Reed v. Health and Human Services*, 774 F.2d 1270, 1275 (4th Cir. 1985), *petition for cert. filed sub nom. Lukhard v. Reed*, 54 U.S.L.W. 3565 (U.S. Feb. 11, 1986) (No. 85-1358).

Federal courts are not in agreement in their resolution of the issue of whether personal injury awards are subject to the lump sum rule. Several district courts, after

being fully briefed on all of the issues, have correctly decided that such awards are subject to the rule. The courts focused on the purpose of the rule, as expressed by its drafter, and on its legislative history, in the context of the AFDC program.

In *Davis v. Coler*, 601 F. Supp. 444 (N.D. Ill. 1984), *appeal pending*, No. 85-2481 (7th Cir. argued Feb. 21, 1986), the district court found that the purpose of the OBRA amendment to the lump sum rule and the deference to be afforded the Secretary of the United States Department of Health and Human Services' interpretation dictated that, as a matter of law, the state and federal defendant's position was correct. 601 F. Supp. at 452-53. In addition to the court in *Davis*, three other federal district courts have specifically addressed the issue and decided that personal injury awards are properly considered income under the lump sum rule. In *Jackson v. Guissinger*, 589 F. Supp. 1288 (W.D. La. 1984), plaintiff negotiated a $19,000.00 personal injury settlement. The court rejected the contention that the money received should be treated as a resource for purposes of determining eligibility.

In *Watkins v. Blinzinger*, 610 F. Supp. 1443 (S.D. Ind. 1985), *appeal pending*, No. 85-2366 (7th Cir. argued Feb. 21, 1986), the court also refused to treat personal injury awards as exempt from the lump sum rule. The *Watkins* court, like the court in *Davis*, was not led astray in defining "income" for purposes of the rule. Finally, the district court in *Betson v. Cohen*, 578 F. Supp. 154, 159 (E.D. Pa. 1983), *rev'd on other grounds sub nom. Barnes v. Cohen*, 749 F.2d 1009 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985), concluded that personal injury awards were not specifically excluded from treatment as income. The court also rejected plaintiffs' effort to exclude such awards based upon the Internal Revenue Code's specific exclusion.

Two Circuit Courts of Appeal, although not specifically addressing the issue raised here, have also treated personal injury awards as countable under the lump sum rule. The plaintiff in *Walker v. Adams*, 741 F.2d 116 (6th Cir. 1984), received an insurance settlement from an automobile accident. The court found that the applicable federal regulation, 45 C.F.R. §233.20(a)(3)(ii)(D), disqualified recipients "when they receive 'lump sum' payments such as an inheritance, disability benefits, an insurance settlement, or a court judgment." 741 F.2d at 119. The court reached this conclusion despite finding that:

> [t]he statute and regulation may indeed produce harsh results to many AFDC recipients (particularly, as in this case, where the lump sum payment would serve to compensate a prior loss).

Id. Similarly, the court in *Sweeney v. Murray*, 732 F.2d 1022 (1st Cir. 1984), recognized that the lump sum rule, 42 U.S.C. §602(a)(17):

> provides that when an AFDC family receives a payment of nonrecurring lump sum income (such as an inheritance, *a personal injury judgment or settlement*, or a workers' compensation award), the family becomes ineligible for AFDC for a prescribed period of time.

732 F.2d at 1024 (emphasis added).

The court in *Reed v. Health and Human Services*, 774 F.2d 1270 (4th Cir. 1985), was wrong when it looked to the Internal Revenue Code and the Food Stamp Act in its efforts to define "income." Simply because the same word is used in various statutes does not mean that its definition is static. The meaning ascribed to the term "income" in the Internal Revenue Code cannot be applied to the term "income" in the AFDC program.

At least one federal district court rejected the *Reed* court's approach and pointed out that the exclusion of personal injury awards as income under the Internal Revenue Code is expressly established by I.R.C. §104(a)(2). *Betson v. Cohen*, 578 F. Supp. 154, 159 (E.D. Pa. 1983), *rev'd on other grounds sub nom. Barnes v. Cohen*, 749 F.2d 1009 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985). The court stated:

> Were such a provision not made, such awards could be considered income under the Internal Revenue Code general provision of income, 26 U.S.C. §61(a). *See Roemer v. Commissioner of Internal Revenue*, 716 F.2d 693, 696 n. 2 (9th Cir. 1983) ("Since there is no tax basis in a person's health and other personal interests, money received as compensation for an injury to those interests might be considered a realized accession to wealth" absent the exclusion.) The plaintiffs' argument fails in light of these considerations.

578 F. Supp. at 159.

Thus, a monetary award for damages is income. The Internal Revenue Code, I.R.C. §104(a)(2), and the federal tax regulations, Treas. Reg. §1.104-1, only exclude personal injury awards from consideration as gross income subject to taxation. Neither provision expressly states that such awards are not income. The Internal Revenue Code merely defines that income which is *taxable* and that which is *nontaxable*.

The *Reed* court's approach illustrates the danger of using one statutory term, particularly a term used in a statute as complex as the Internal Revenue Code, to construe a similar term in another statute, the Social Security Act. The definition and application of income, gross income, exclusions from income and so on in the Internal Revenue Code are clearly terms of art, which have been

the subject of continuing legislative amendment and judicial scrutiny. The *Reed* court indiscriminately selected one particular term and pronounced, by analogy only, that its meaning has some greater relevance in determining the application of the term in another statute.

One demonstration of the danger of construing terms in the Internal Revenue Code with terms in the AFDC statute is found in section 102 of the Internal Revenue Code. I.R.C. §102. Section 102 excludes gifts or inheritances from gross income. Under the *Reed* court's analysis, an AFDC recipient could receive a sizable cash gift or inheritance and remain eligible for AFDC.

Finally, where both Congress and the Secretary of Health and Human Services adopt a particular meaning from another statute, they do so expressly. The treatment of the Earned Income Tax Credit provides an excellent example. The amendments to the AFDC program contained in OBRA, the same amendatory legislation which included the lump sum rule, provided that any Earned Income Tax Credit available to an AFDC family is to be factored into the calculation of the AFDC grant. In enacting the Earned Income Tax Credit amendment, Congress explicitly adopted terms and definitions of the Internal Revenue Code. Section 2305 of OBRA amended section 402(d)(1) of the Social Security Act and provided:

> For purposes of this part of [the AFDC statute], an individual's "income" shall also include, to the extent and under the circumstances prescribed by the Secretary, an amount (which shall be treated as earned income for purposes of this part) equal to the earned income advance amount (*under section 3507(a) of the Internal Revenue Code of 1954*), that is (or, upon the filing of an earned income eligibility certificate, would be) payable to such individual.

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §2305, 95 Stat. 845, *codified at* 42 U.S.C. §602(d)(1) (emphasis added).

The Secretary of Health and Human Services promulgated an implementing regulation regarding the Earned Income Tax Credit with an express reference to the Internal Revenue Code. The regulation provides that:

> [t]he State agency shall make the [Earned Income Tax Credit] determination based upon the requirements specified in the *Internal Revenue Code under* 26 U.S.C. §43 and 3507, *and under the corresponding regulations at* 26 C.F.R. §1.43-1, 1.43-2, 31.3507-1 and 31.3507-2, which establish eligibility criteria for receipt of earned income credit and advance payments of the credit.

47 Fed. Reg. 5676 (1982), *codified at* 45 C.F.R. §233.20(a)(6)(ix)(B)(1) (emphasis added).

The failure of Congress to adopt a definition of income from another statute in reference to lump sum payments underscores the flexibility it intended the Department of Health and Human Services and state agencies to have in considering what payments constitute lump sum income. The Fourth Circuit has ignored this flexibility and bound the Virginia agency to an interpretation contrary to the law. The States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania contend that this anomaly should not be permitted.

CONCLUSION

For the foregoing reasons the States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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